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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

RESPONDENTS' APPENDIX

EDWIN W. LAWRENCE,
Woolworth Building,
Rutland, Vermont

ARTHUR L. GRAVES,
65 Railroad Street,
St. Johnsbury, Vermont,
Attorneys for Respondents.

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Appendix G

STATE OF VERMONT

SUPREME COURT

December 28, 1961.

Mrs. Florence Smith, Clerk,
Public Service Board,
Montpelier, Vermont. Re: 1910, Wash, Citizens Utilities Co. v. Prouty, et als.

Dear Mrs. Smith:

This office has not received any motion for permission to re-argue from the office of Mr. C. G. Parker of Morrisville, Vt. within the time extended by the Supreme Court, i.e., December 22, 1961, for the filing of such motion.

The case is therefore certified to the Public Service Board on the entry of November 21, 1961 in this cause according to the notice of such entry mailed to you and counsel in this case on that date.

Very truly yours,

NORMAN E. PEDUZZI
Clerk.

CC: Mr. C. G. Parker
Mr. E. W. Lawrence
Mr. F. A. Bosworth
Mr. A. L. Graves

Appendix H

STATE OF VERMONT
PUBLIC SERVICE BOARD

No. 2742

CITIZENS UTILITIES COMPANY
(Newport Electric Division)

HEARING
Montpelier, Vermont
January 1962

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST COMPANY

ORDER OF DISMISSAL

Pursuant to opinion of the Supreme Court of Vermont filed November 21, 1961, and certificate as to final entry in that Court dated December 2nd, 1961, the order of the Public Service Commission dated November 10, 1960, purporting to authorize the Petitioner, Citizens Utilities Company, to condemn and to acquire the Petitioners' property is vacated and annulled and the Petition of Citizens Utilities Company is dismissed for want of jurisdiction.

Dated at Montpelier in the County of Washington and State of Vermont this 29th day of January, 1962.

JOHN D. PETERSON
WILLIAM F. SINCLAIR
Public Service Board of Vermont

OFFICE OF CLERK
FILED: February 1, 1962
ATTEST: Florence Smith
CLERK

Appendix H

STATE OF VERMONT

PUBLIC SERVICE BOARD

I, FLORENCE SMITH, Clerk of the Public Service Board of the State of Vermont, having by law the custody of the seal and all the records, books, documents and papers of, and appertaining to said Board, hereby certify that the pages hereto attached are a true copy of Order of Dismissal, dated January 29, 1962, issued in PSB Case No. 2742 in re Citizens Utilities Company (Newport Electric Division) v. Charles T. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinore Prouty Mallory and Third National Bank and Trust Company, as fully and completely as the same appear by the original files and records of said Board.

Given under my hand, and the seal of said Board at Montpelier, in the County of Washington, on this 1st day of February, A. D., 1962.

(SEAL)

FLORENCE SMITH, Clerk

Appendix 1

STATE OF VERMONT
PUBLIC SERVICE COMMISSION

No. 2742

CITIZENS UTILITIES COMPANY
(Newport Electric Division)

v.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY, AND THIRD NATIONAL BANK AND TRUST COMPANY

Hearing at
Montpelier, Vermont
April 28, 1959

PRESENT: Commissioners Ross, Sinclair and Lowe.

APPEARANCES: Clifton G. Parker, Esq. and Arthur S. Friedman, Esq. of the law firm Gallop, Climenko & Gould
For Citizens Utilities Company

Arthur L. Graves, Esq.
For Elsinor Prouty Mallory

Edwin C. Lawrence, Esq.
For Charles T. Prouty

The following plea was presented in behalf of John A. Prouty and Elsinor Prouty Mallory entitled:

"PLEA TO THE JURISDICTION

Now come the Petitioners, John A. Prouty and Elsinor Prouty Mallory, in their own proper person specially and not otherwise, solely for the purpose of this plea to the jurisdiction of The Commission, and say that this Commission ought not to have or take further cog-

nizance of the Petition for Condemnation in the above entitled proceedings, because they severally say that the Clyde River upon which are situated the realty and interests in the City of Newport, water power, dam, and water privileges, which the Petitioner is seeking to condemn is a navigable stream and waters of the United States; and that the Petitioner for the purpose of developing electric power and energy has never applied for or obtained a license pursuant to the Federal Power Act, and has never applied for or obtained a permit or valid existing right-of-way granted prior to June 10, 1920, to construct, operate or maintain any dam across, along or in such navigable waters of the United States, to wit, Clyde River, and this the said Petitioners are ready to verify; wherefore, they pray judgment whether the Honorable Public Service Commission of the State of Vermont can or will take further cognizance of the aforesaid proceedings.

s/ John A. Prouty,

s/ Elsinor Prouty Mallory"

A similar plea was also filed by Charles T. Prouty, Genevieve Prouty Gage, and Third National Bank and Trust Company.

"ORDER

Upon consideration of the oral arguments and briefs on said prayers for the Commission to determine whether to proceed to hear said condemnation action by Citizens Utilities Company, the Commission determined that said plea ought to be and is denied and that it will take further cognizance of the aforesaid proceedings."

Appendix I

Dated at Montpelier, County of Washington and State of Vermont, this 12th day of June, A.D. 1959.

s/ CHARLES R. ROSS
s/ WILLIAM F. SINCLAIR
s/ NORMAN LOWE

Public Service Commission of Vermont

OFFICE OF CLERK
FILED: June 12, 1959
ATTEST: s/ Florence Smith
CLERK

STATE OF VERMONT

PUBLIC SERVICE COMMISSION

I, FLORENCE SMITH, Clerk of the Public Service Commission of the State of Vermont, having by law the custody of the seal and all the records, books, documents and papers of, and appertaining to said Commission, hereby certify that the pages hereto attached are a true copy of Order Denying Plea, dated June 12, 1959, issued in PSC Case No. 2742, in re Citizens Utilities Company (Newport Electric Division) vs. Charles T. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinor Prouty Mallory and Third National Bank and Trust Company, as fully and completely as the same appear by the original files and records of said Commission.

Given under my hand, and the seal of said Commission at Montpelier, in the County of Washington on this 12th day of June, A. D., 1959.

(SEAL)

FLORENCE SMITH, Clerk

Appendix J

Extracts from Opinion and Order of the Federal Power Commission, made part of record by Vermont Public Service Commission in its Additional Findings of Fact October 17, 1960, Appendix C, page 44a.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

In the Matter of	Docket Nos. E-6710 and E-6760
CITIZENS UTILITIES COMPANY	

OPINION NO. 318
Unofficially Reported 27 PUR 3d 1
OPINION AND ORDER REQUIRING APPLICATION FOR LICENSE
(Issued February 16, 1959)

NAVIGABILITY OF THE CLYDE RIVER

In this proceeding we are first [illegible] on whether Citizens' developments are located [illegible] navigable water" of the United States, for Section 23 of the Act provides that it shall be unlawful for any person to construct, operate or maintain a dam or other work [illegible] any of the navigable waters of the United States. As indicated above, Citizens contends that none of its developments is located in a "navigable water" of the United States, and the State of Vermont, the State Water Conservation Board, and Barton Village take the same position. Staff counsel argue that the Clyde River is a "navigable water" from its mouth to its source at Spectacle Pond and the Fish Clubs are in agreement.

Appendix J

EFFECT ON INTERESTS OF INTERSTATE OR FOREIGN COMMERCE

Whether or not the Clyde is navigable above the outlet of the canal at its Unit No. 11 development, Citizens' developments on the river are plainly built to control the flow of the river so as to bring about the most efficient generation of power. By the operation of its project works—Unit No. 11, Newport, Charleston, Seymour Lake and Echo Pond—Citizens can and does affect the navigable capacity of the river in the stretch below its Unit No. 11 development. We have before us not five separate projects but project works at five locations physically interdependent and operated in coordination for power purposes, so that the entire group is maintained as a single, integrated unit of development for the purpose of exploiting the resources of the river.

* * * * *

We conclude that the maintenance and operation of Citizens' facilities on the Clyde River can and do affect the navigable capacity of the river downstream, including a portion of the river below Citizens' Unit No. 11 plant, and are thus subject to our jurisdiction.

NECESSITY FOR ACTION BY THIS COMMISSION IN ACCORDANCE WITH THE POWER ACT

Concluding as we do that the Clyde River is a navigable water of the United States from Island Pond to Lake Memphremagog and that even if it were navigable only below Unit No. 11, Citizens' facilities are on waters over which we have jurisdiction because they affect navigable waters, the question arises as to what action is required and appropriate on our part. As to our authority we note that upon making an investigation of the occupancy of hydro-electric facilities of bodies of water over which Congress has jurisdiction, under Section 4(g) we are authorized to issue such orders as we "may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region." Under Section 23(b) it is unlawful for any person to maintain a dam on any navigable

water of the United States except under the terms of a permit or license. Under Section 309 we are authorized to issue such orders as we may find necessary or appropriate to carry out the provisions of the Act. Among the objectives of the Act particularly important here are those set forth in Section 10(a) "that the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehenisve plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."

The record has shown interference with boating on the Clyde River but the principal injury caused by Citizens' facilities has been damage to fish at their spawning grounds below the Newport powerhouse. Involved are Atlantic salmon which travel via the St. Lawrence, the St. Francis, the Magog River and Lake Memphremagog to spawn in the Clyde. Other fish injured by lack of water withheld by Citizens' project works include steelhead trout, land-locked salmon and suckers. Photographs and testimony in the record portray quantities of fish struggling and dying in the shallow water in the stream bed during the spring spawning season.

In this situation we shall require that Citizens apply for a license for all of its project works so that by appropriate conditions we may, among other things, give such relief to the recreational and commercial interests involved in boating and fishing as may be required.

Because of the full discussion of the issues in the briefs and the exceptions filed we are of the opinion that oral argument is not necessary.

The Commission further finds:

(1) Citizens Utilities Company (Citizens) is a corporation organized and existing under the laws of the State of Delaware.

Appendix J

(2) Clyde River from near its source at Island Pond to its mouth at Newport, Vermont, is a navigable water of the United States.

(3) The maintenance and operation of Citizens' Unit No. 11, Newport and Charleston hydro-electric developments, and the Echo Pond and Lake Seymour reservoirs referred to above, have affected and are capable of continuing to affect the navigable capacity of the Clyde River downstream from such facilities and will affect the interests of interstate or foreign commerce.

(4) It is appropriate, expedient, and in the public interest to issue an order to conserve and utilize the navigation and water resources of the region of the Clyde River basin occupied by Citizens' project works set forth in (3) above, for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

The Commission orders:

(A) Citizens Utilities Company shall file an application for license under the Federal Power Act for the continued operation and maintenance of its project consisting of the Unit No. 11, Newport and Charleston hydro-electric developments and the Seymour Lake and Echo Pond dams, referred to above.

(B) Such application shall be filed in accordance with the Commission's Regulations under the Federal Power Act and within 120 days from the date of issuance of this order.

(C) Exceptions not specifically granted herein are hereby denied.

(D) Exhibit 22 is hereby admitted into evidence.

(E) Citizens' motion for oral argument is hereby denied.

By the Commission. Commissioner Kline dissenting. Commissioner Hussey not participating.

s/ JOSEPH H. GUTRIDE,
Joseph H. Guthride,
Secretary.

Appendix K

COPY—PETITIONEES' EXHIBIT 5

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman
Frederick Stueck, Arthur Kline and
John B. Hussey

In the Matter of	
CITIZENS UTILITIES COMPANY	Dockets Nos. E-6716 and 6760

ORDER DENYING APPLICATION OR AMENDMENT OF PARAGRAPH (C) OF COMMISSION ORDER DENYING REHEARING

(Issued June 19, 1959)

On May 22, 1959, Citizens Utilities Company applied for an amendment of paragraph (C) of the Commission's order issued April 3, 1959, denying an application for rehearing on the Commission's order issued February 16, 1959, requiring Citizens to apply for a license under the Federal Power Act for the continued operation and maintenance of its hydroelectric developments on the Clyde River in Vermont and on a tributary thereof. Specifically, Citizens seeks to have paragraph (C) of the order of April 3, 1959, amended so as to require the release of 35 cubic feet of water per second at Unit No. 11 diversion dam from April 3 to May 20, 1959 only, and for the same period of each year thereafter, during the pendency of a review of the proceedings.

Paragraph (C) of the Commission's order of April 3, 1959, requires that until further order of the Commission, Citizens shall release a minimum flow of 35 cubic feet of water per second through the sluice gate of its Unit No. 11 diversion dam in the Clyde River from the date of issuance of that order through June 30, 1959, and thereafter each year from April 1 through June 30 and during such additional

period or periods as fish are spawning or migrating in the river below the Unit No. 11 diversion dam.

The Fish and Game Service of the State of Vermont by letter of June 1, 1959, has stated that to insure maximum survival of trout during spring spawning, it is necessary that no curtailment of the volume of flow required by the order of April 3, 1959 should be permitted. By letter dated June 19, 1959, from the Secretary of the Interior, the United States Fish and Wild Life Service reports that adult rainbow trout usually enter the river from Lake Memphremagog during April and remain until the middle of May. Many rainbow trout eggs are not hatched until well past the middle of June. The river serves as a nursery area for these young fish.

The Fish and Game Service of the State of Vermont and the Secretary of the Interior recommend that the minimum flow of 35 cubic feet per second be continued from April 1 through June 30 and that the application of Citizens Utilities Company for amendment of paragraph (C) of the Commission's order of April 3, 1959, be denied.

DC 19

The Commission further finds:

It is appropriate and in the public interest in carrying out the provisions of the Federal Power Act that the application for amendment of the Commission's order of April 3, 1959, be denied.

The Commission orders:

The aforesaid application for amendment of the order of April 3, 1959, is hereby denied.

By the Commission.

/s/ JOSEPH H. GUTRIDE,
Joseph H. Gutride, Secretary.

This is certified to be a true and correct copy of a document in the files of the Federal Power Commission.

Date: January 3, 1961 /s/ J. H. GUTRIDE,
J. H. Gutride, Secretary.

Federal Power Commission

Appendix L

CITIZENS UTILITIES COMPANY,
Petitioner,

FEDERAL POWER COMMISSION,
Respondent.

Docket 27168

United States Court of Appeals
Second Circuit.

Argued Oct. 30, 1961

Decided Nov. 2, 1961

Petition to review an order of the Federal Power Commission.

PER CURIAM.

Motion of the Federal Power Commission to dismiss the petition for review is granted and petitioner's motion for a stay is denied as moot; all issues now before us were fully decided in Citizens Utilities Co. v. F. P. C., 2 Cir., 279 F. 2d 1, and are here *res judicata*.